

4
No. 85-1581

Supreme Court, U.S.

FILED

APR 25 1986

JOSEPH E. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

RICHARD SOLORIO
Yeoman, First Class, U.S. Coast Guard,
Petitioner,
v.
UNITED STATES OF AMERICA
Respondent.

**Petition For A Writ Of Certiorari To The United States
Court Of Military Appeals**

**BRIEF OF THE APPELLATE DEFENSE DIVISION
UNITED STATES NAVY-MARINE CORPS APPELLATE
REVIEW ACTIVITY AS AMICUS CURIAE IN SUPPORT
OF THE PETITION FOR A WRIT OF CERTIORARI**

SUSAN R. CORNELL
Lieutenant, JAGC,
U.S. Naval Reserve

Navy-Marine Corps
Appellate Review
Activity
Washington Navy Yard
Washington, D.C. 20374
(202) 433-2297

DAVID C. LARSON
Captain, Judge
Advocate General's
Corps (JAGC), U.S. Navy

*Attorney of Record
for Amicus Curiae*

FREDERICK N. OTTIE
Lieutenant Commander, JAGC
U.S. Navy

QUESTIONS PRESENTED

1. Whether retroactive judicial expansion of court-martial jurisdiction violates due process of law?
2. Whether the victim's dependent status, without more, is sufficient service-connection to establish court-martial jurisdiction?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS	2
STATEMENT OF THE CASE	2
ARGUMENT	3
I. The Substantial Impact Of The Decision Below And The Nature Of Military Appellate Review Merit The Intervention Of This Court.	3
II. Due Process Of Law Prohibits Retroactive Ju- dicial Expansion Of Court-Martial Jurisdiction.	5
III. The Dependent Status Of The Victim, Without More, Is Insufficient Service-Connection To Establish Court-Martial Jurisdiction.	6
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
<i>Bouie v. City of Columbia</i> , 378 U.S. 347 (1964) . . .	5
<i>Murray v. Haldeman</i> , 16 M.J. 74 (C.M.A. 1983) .	6
<i>O'Callahan v. Parker</i> , 395 U.S. 258 (1969)	5-9
<i>Relford v. Commandant</i> , 401 U.S. 355 (1971)	5, 7-9
<i>United States v. Henderson</i> , 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969)	5
<i>United States v. McGonigal</i> , 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969)	5
<i>United States v. Norman</i> , 9 M.J. 355 (C.M.A. 1980)	6
<i>United States v. Shockley</i> , 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969)	5
<i>United States v. Smith</i> , 9 M.J. 359 (C.M.A. 1980)	6
<i>United States v. Solorio</i> , 21 M.J. 251 (C.M.A. 1986)	3, 8
<i>United States v. Solorio</i> , 21 M.J. 512 (C.G.C.M.R. 1986)	3, 9
<i>United States v. Trottier</i> , 9 M.J. 337 (C.M.A. 1980)	6
<i>United States ex rel. Hirshberg v. Cooke</i> , 336 U.S. 210 (1949)	9
STATUTES:	
10 U.S.C.A. § 862 (West Supp. 1984)	2
10 U.S.C. § 866 (1982)	4
10 U.S.C. § 867 (1982)	4
10 U.S.C. § 870 (1982)	2

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

No. 85-1581

RICHARD SOLORIO
Yeoman First Class, U.S. Coast Guard
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

**Petition For a Writ Of Certiorari To The United
States Court Of Military Appeals**

**BRIEF OF THE APPELLATE DEFENSE
DIVISION UNITED STATES NAVY-MARINE
CORPS APPELLATE REVIEW ACTIVITY
AS AMICUS CURIAE IN SUPPORT OF THE
PETITION FOR A WRIT OF CERTIORARI**

Petitioner and Respondent have consented to the submission of this amicus curiae brief by the Appellate Defense Division in support of petitioner. Copies of the consents have been filed with the Court.

INTEREST OF THE APPELLATE DEFENSE DIVISION

The Appellate Defense Division represents convicted members of the Naval Service before the U.S. Navy-Marine Corps Court of Military Review, the U.S. Court of Military Appeals, and the U.S. Supreme Court. This representation is provided for by Article 70, Uniform Code of Military Justice, 10 U.S.C § 870 (1982).

The Appellate Defense Division is the principal source of representation for all Navy and Marine Corps members sentenced to a punitive discharge or more than one year's confinement. The decision of the court below is an unprecedented and unconstitutional expansion of court-martial jurisdiction. If allowed to stand, that decision will have an adverse impact on Navy and Marine Corps personnel by depriving them of the fundamental rights protected by civilian courts.

STATEMENT OF THE CASE

The facts are cogently and completely set out in the petition. Essentially, petitioner was charged with committing various sex offenses with two young girls. Some of the alleged offenses occurred while petitioner was stationed in Juneau, Alaska, while the others allegedly occurred after petitioner was transferred to Governors Island, New York. The court-martial was convened at Governors Island. At trial the defense successfully moved to dismiss the charges relating to the Alaska offenses for lack of subject-matter jurisdiction. The Government appealed pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C.A. §

862 (West Supp. 1984). The U.S. Coast Guard Court of Military Review reversed the military judge. *United States v. Solorio*, 21 M.J. 512 (C.G.C.M.R. 1985). Petitioner appealed to the U.S. Court of Military Appeals which affirmed the lower court's decision. *United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986). Petitioner was subsequently convicted of eight offenses committed in Alaska.

ARGUMENT

I

THE SUBSTANTIAL IMPACT OF THE DECISION BELOW AND THE NATURE OF MILITARY APPELLATE REVIEW MERIT THE INTERVENTION OF THIS COURT

The decision of the court below represents a judicial expansion of court-martial jurisdiction. Before this decision, the dependent status of the victim, without more, was not enough to establish service-connection. The decision below changed that position, not only for petitioner, but for every servicemember similarly accused.

Every member of the military, including the U.S. Navy, U.S. Army, U.S. Air Force, U.S. Marine Corps, and the U.S. Coast Guard will be affected by the lower court's decision. The U.S. Court of Military Appeals reviews cases from all the services. Consequently, decisions of that court are binding on every servicemember. If allowed to stand, the decision below will adversely impact not only on petitioner and other members of the Coast Guard but on every member of the Armed Forces. A significant number of individuals face the deprivation of the rights protected

by civilian courts but not available to individuals facing trial by court-martial.

In addition, given the nature of military appellate review, intervention of this Court at this time is appropriate. As stated above, petitioner was convicted of eight offenses committed in Alaska, and the case will be automatically reviewed by the U.S. Coast Guard Court of Military Review. Uniform Code of Military Justice, Art. 66, 10 U.S.C. § 866 (1982). Review by the U.S. Court of Military Appeals, however, is discretionary. Uniform Code of Military Justice, Art. 67, 10 U.S.C. § 867 (1982). Petitioner must petition that court for review of his court-martial. *Id.* Because petitioner may only seek this Court's review if the U.S. Court of Military Appeals grants review, this may be the only opportunity for this Court to review petitioner's case.

The issue here is ripe for review by this Court. The subject-matter jurisdiction issue was fully litigated at the trial level, and was fully discussed by both military appellate courts. All the facts necessary for disposition of the issue are set forth in the petition. The subsequent trial on the merits did not reveal any new matter relevant to the subject-matter jurisdiction issue. Because the issue has been fully developed below, and given the uncertainty of another opportunity to petition this Court, the petition for a writ of certiorari should be granted this time.

II

DUE PROCESS OF LAW PROHIBITS RETROACTIVE JUDICIAL EXPANSION OF COURT- MARTIAL JURISDICTION.

In *Bowie v. City of Columbia*, 378 U.S. 347 (1964), this Court held that an unforeseeable and retroactive judicial expansion of statutory language violates due process. *Bowie* at 352. The principle announced in *Bowie* is applicable to petitioner's case.

This Court first announced the service-connection test for determining court-martial jurisdiction in *O'Callahan v. Parker*, 395 U.S. 258 (1969). That test was applied by this Court in *Relford v. Commandant*, 401 U.S. 355 (1971). Subsequent to the *O'Callahan* decision, the U.S. Court of Military Appeals decided several cases with facts similar to those of the current petition. In applying the service-connection test, the court below has repeatedly held that dependent status of the victim, without more, is an insufficient basis for court-martial jurisdiction. *United States v. McGonigal*, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969). The court below, however, ignored its own precedents and held that the dependent status of the victim is now sufficient basis for court-martial jurisdiction. In essence, an offense which prior to petitioner's case could not be tried by court-martial can now be prosecuted by the military.

The lower court's expansion of court-martial jurisdiction to offenses involving military dependents was

unforeseeable. Although the court below has expanded court-martial jurisdiction before, those cases involved illegal drugs. See *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); *United States v. Smith*, 9 M.J. 359 (C.M.A. 1980); *United States v. Norman*, 9 M.J. 355 (C.M.A. 1980); *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980). The specific language of the lower court in those cases indicates that its expansion was limited to drug offenses. In *Trottier*, the court stated that offenses involving drugs have a special effect on the military and combat readiness that other offenses do not. *Trottier* at 346 n.22. Thus, while court-martial jurisdiction has gradually expanded with respect to drug offenses, basing jurisdiction on the status of the victim was unforeseeable and without warning.

Even if the ruling of the lower court is correct, its retroactive application to petitioner is a violation of due process. When the alleged offenses were committed, petitioner was subject only to prosecution in civilian court. He was guaranteed indictment by grand jury and trial by a petit jury of his peers. Without warning, the lower court reinterpreted the concept of service-connection and retroactively applied its new expanded test to petitioner. That retroactive application was unforeseeable and deprived petitioner of due process of law.

III

THE DEPENDENT STATUS OF THE VICTIM, WITHOUT MORE, IS INSUFFICIENT SERVICE- CONNECTION TO ESTABLISH COURT-MARTIAL JURISDICTION.

In *O'Callahan v. Parker*, 395 U.S. 258 (1969), this Court first set forth the service-connection test for

determining court-martial jurisdiction. *O'Callahan* was a U.S. Army soldier convicted of various offenses committed off base in a leave status. The victim was a civilian with no military connections. This Court held that while the status of the offender as a servicemember is necessary for court-martial jurisdiction, it is not dispositive. *O'Callahan* at 267. There must also be a showing that the offense is service-connected. *Id.* at 272. The *O'Callahan* Court analyzed the facts in light of several factors¹ and determined that the offenses were not service-connected. *Id.* at 273.

The *O'Callahan* Court recognized that military courts do not provide the constitutional safeguards essential to civilian courts. *Id.* at 262-63. The nature of military discipline, however, necessitates a limited system of military courts. *Id.* at 261. Those courts are excepted from the constitutional protections guaranteed by civilian courts. *Id.* The Court determined that because military courts lack specific constitutional protections their jurisdiction extends only to those offenses that are service-connected. *Id.*

In *Relford v. Commandant* 401 U.S. 355 (1971), the Court applied the service-connection test to a U.S. Army corporal who committed various offenses against two females. One of the victims was the sister of a servicemember and the other was a servicemember's wife. All of the offenses occurred on military installations. *Relford* at 360. Based on an application

¹ The factors considered by the *O'Callahan* Court were: the petitioner's proper absence from the base, the commission of the offenses off base, the civilian status of the victim, the absence of military control over the location of the offenses and the availability of civilian courts to prosecute. *O'Callahan* at 273.

of the *O'Callahan* factors, the *Relford* Court held that the offenses were service-connected.² *Id.* at 365.

In petitioner's case, the trial judge applied the factors enunciated by the *Relford* Court. After announcing his findings, the judge ruled that the offenses allegedly committed by petitioner in Alaska were not service-connected. *United States v. Solorio*, 21 M.J. at 252. In affirming the intermediate appellate court's reversal, the court below reanalyzed the facts and held that the offenses were service-connected. *Solorio*, 21 M.J. at 258.

The lower court found sufficient service-connection simply on the basis that child sexual abuse has an impact on the military. *Solorio*, 21 M.J. at 255-57. Two points need be made here. First, any offense committed by a servicemember has some impact upon his service. At the very least, the military is deprived of his services while he is prosecuted and serving sentence and it casts the military in a bad light when his uniformed status is exposed. However, to use such

² The *Relford* Court enunciated the following factors: 1) the serviceman's proper absence from the base; 2) the crime's commission away from the base; 3) its commission at a place not under military control; 4) its commission within our territorial limits and not in an occupied zone of a foreign country; 5) its commission in peacetime and its being unrelated to authority stemming from the war power; 6) the absence of any connection between the defendant's military duties and the crime; 7) the victim's not being engaged in the performance of any duty relating to the military; 8) the presence and availability of a civilian court in which the case can be prosecuted; 9) the absence of any flouting of military authority; 10) the absence of any threat to a military post; 11) the absence of any violation of military property; 12) the offense's being among those traditionally prosecuted in civilian courts. *Relford* at 356.

a basis would truly destroy this Court's binding decisional law in *O'Callahan* and *Relford*. The lower court may not eradicate the limitations on court-martial jurisdiction that this Court has left intact.

Second, the court's attempt to carve out a special jurisdictional niche for child sexual abuse in terms of the psychological effect on the victim and the attendant impact on the military is unsound. The same can be done for any serious crime perpetrated on a military dependent. Surely, the psychological impact of murder, or of any violent crime against a dependent on the military member, and in turn, on the military, is just as severe. Today the tragedy of child sexual abuse is topical; tomorrow, another may take its place. "Jurisdiction to punish rarely, if ever, rests upon such illogical and fortuitous contingencies." *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 at 214 (1949).

In addition, there is no indication that the civilian justice system is any less interested in or is any less capable of protecting the rights of victims than is the military justice system. The Coast Guard has been completely satisfied with the treatment of similar cases by the Alaskan courts. *Solorio*, 21 M.J. at 518. In petitioner's case the Alaskan authorities were willing and able to prosecute, but merely deferred to the military. *Solorio*, 21 M.J. at 515. The military justice system, however, has not changed to the extent that it provides the constitutional protections of indictment by grand jury and trial by petit jury.

A detailed analysis of the *Relford* factors to the facts in petitioner's case is set forth in the petition. That analysis reveals that the offenses were not service-connected. A victim's status as a military de-

pendent, without more, is simply insufficient service-connection to establish court-martial jurisdiction.

CONCLUSION

This case involves an issue of significant importance to every member of the Armed Services. If allowed to stand, the lower court's unconstitutional judicial expansion of court-martial jurisdiction will go unchecked. Ultimately, a separate military justice society would be created, prosecuting individuals without constitutional protections, regardless of any military interest.

Respectfully submitted,

DAVID C. LARSON
Captain, Judge
Advocate General's
Corps (JAGC), U.S. Navy
Attorney of Record
for Amicus Curiae

FREDERICK N. OTTIE
Lieutenant Commander, JAGC
U.S. Navy

SUSAN R. CORNELL
Lieutenant, JAGC
U.S. Naval Reserve